ALSO: ART DECO - Joe Fleming Article

Historical and Architectural Controls

Committee on Urban Environment

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I. New Orleans Historic Preservation Law: Its National Impact

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A. *Introduction*

Two recent United States Supreme Court decisions involving the New Orleans French Quarter have had a national impact on historic preservation law. The cases are *Maher v. City of New Orleans*[1] and *City of New Orleans v. Dukes*.[2] They were the first historic district cases to reach the nation's highest court, and both decisions were rendered in favor of historic preservation regulations in such special zoning districts.

Landmarks of special national significance in the New Orleans area are the Cabildo, St. Louis Cathedral, Jackson Square and Chalmette Battlefield. The Deed of Cession completing the

1. 516 F.2d 1051 (1975), *cert. denied*, 426 U.S. 905 (1976).
2. 427 U.S. 297 (1976).

Louisiana Purchase was signed in the Cabildo in 1803.[3] St. Louis Cathedral is next to the Cabildo, and there, in 1815, Major General Andrew Jackson and his staff gave thanks for their victory over British forces on nearby Chalmette Battlefield.[4]

The first notable historic preservation controversy in the French Quarter occurred when the Cabildo was threatened with demolition toward the end of the last century. The Cabildo was constructed by the Spanish in 1795. One century later the New Orleans City Council approved a motion authorizing the preparation of plans for a new Louisiana Supreme Court building to replace the Cabildo. The New Orleans Bar met twice during November of that year to prepare for legal action to stop the proposed demolition. During the second meeting on November 9, Benjamin R. Forman questioned the city's legal right to demolish the Cabildo. He argued that the historic structure was federal property according to the terms of the 1803 cession. Due to vigorous opposition to the demolition plans, the City Council reversed its decision. Thus, the Cabildo was saved from destruction.[5]

As this century began, the French Quarter, or Vieux Carré, was mainly a slum area. During the 1920s, commercial building development in the adjacent central business district made the enactment of historic district legislation crucial for the French Quarter if the area was to be preserved.

Chalmette Battlefield has also not been free from preservation controversy. In 1855, Louisiana purchased part of the battlefield. The state donated the land to the United States government in 1907, and the Chalmette National Historical Park was established in 1939. After a prolonged controversy with the Louisiana Landmarks Society and other preservation groups, the Kaiser Aluminum and Chemical Corporation donated an additional sixty-six acres to the park in 1965. Part of the battlefield has been lost to the Mississippi River, and this is a continuing threat.[6]

3. DAVIS, LOUISIANA 163 (1965); DUFOUR, TEN FLAGS IN THE WIND 133–34 (1967). *See generally* Deutsch, *A Jewel of the Place d'Armes*, 54 A.B.A.J. 370 (1968).

4. G. KING, NEW ORLEANS 252–54 (5th ed. 1907).

5. *See* Forman, *Historic Preservation and Urban Development Law In Louisiana*, 21 LA. B.J. 197 (1973).

6. *See* FEDERAL WRITERS' PROGRAM, LOUISIANA, A GUIDE TO THE STATE 483–85 (Hansen ed. 1971); CULLISON, THE LOUISIANA LANDMARKS SOCIETY: THE FIRST THIRTY YEARS 14, 21 (1980).

B. *The Vieux Carré Commission Amendment to the Louisiana Constitution*

In 1936, the Vieux Carré Commission Amendment[7] to the Louisiana Constitution was approved by the state's citizens. The amendment stated that the New Orleans Commission Council was authorized to organize the Vieux Carré Commission, the purpose of which was

> the preservation of such buildings in the Vieux Carré section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana.[8]

The Vieux Carré was defined in the amendment as the area within the boundaries of the Mississippi River, the uptown side of Esplanade Avenue, the river side of Rampart Street and the lower side of Iberville Street.

In the following year, the New Orleans Commission Council enacted the Vieux Carré Commission Ordinance to preserve the historical and architectural character of the French Quarter. This ordinance prohibited the modification of French Quarter buildings without the Commission's permission. It established the second historic preservation district in the United States and the first in Louisiana.[9]

The Vieux Carré Commission consists of nine members, one of whom must be a member of the Louisiana Historical Society. Another must be a director of the Louisiana State Museum, and there must also be a member of the Chamber of Commerce. Three qualified architects from the New Orleans Chapter of the American Institute of Architects and three at large appointments complete the Commission. Commission members are appointed for terms of four years by the mayor with the advice and consent of the City Council.[10] The Vieux Carré Commission's authority was retained in the Louisiana Constitution of 1974.[11]

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7. LA. CONST. of 1921, art. 14, § 22A.
8. *Id.*
9. New Orleans, La., Ordinance 14, 538 (Mar. 3, 1937). *See also* MORRISON, HISTORIC PRESERVATION LAW 17 n.11 (2d ed. 1974).
10. LA. CONST. of 1921, art. 14, § 22A.
11. LA. CONST. art. 6, § 17.

C. *Louisiana Supreme Court Decisions*

1. BUILDING REGULATIONS

In 1941, the owner of the Napoleon House in the French Quarter was convicted of violating the Vieux Carré Commission Ordinance by constructing an extension to his building in the interior courtyard. He contended that the law applied only to a building's exterior and not to a patio. The court's opinion was written by Chief Justice E. Howard McCaleb, Jr., and it cited the Vieux Carré Commission Amendment as authority for the ordinance. Thus, judgment was rendered for the city in the case of *City of New Orleans v. Impastato.*[12]

In 1957, the city sought an injunction ordering a French Quarter property owner to remove a plastic roof covering a courtyard between two buildings. The court refused to grant an injuction in the case of *City of New Orleans v. Levy.*[13] The city's failure to seek injuctions against numerous similar violations in the Vieux Carré was mentioned as the reason for not granting the injunction. Regulatory measures, the court concluded, should be "enforced in like manner as to all other persons similarly situated."[14]

The first *Maher* case[15] was heard by the Louisiana Supreme Court after the Vieux Carré Commission granted permission to the petitioner to obtain a demolition permit to tear down a late nineteenth century Victorian cottage in the French Quarter. Permission to demolish the building was granted because the Commission decided that it did not possess architectural and historical value. The City Council, however, made an opposite determination and overruled the Commission. The Council's decision in interpreting the Vieux Carré Commission Ordinance was upheld by the court.

In 1971, the same petitioner filed suit in the United States District Court for Eastern Louisiana seeking a declaration that the Vieux Carré Commission Ordinance was unconstitutional. He contended that the ordinance's purpose could be "accomplished only through the exercise of eminent domain with its attendant constitutional requirement of compensation[16] under the Fifth

12. 198 La. 206, 3 So. 2d 559 (1941).
13. 233 La. 844, 98 So. 2d 210 (1957).
14. *Id.* at ———, 98 So. 2d at 214.
15. 256 La. 131, 235 So. 2d 402 (1970). For a related case about the City Council's power of review, *see* Tucker v. City Council of New Orleans, 343 So. 2d 396 (1977).
16. Maher v. City of New Orleans, 371 F. Supp. 653, 661 (E.D. La. 1974).

Amendment to the United States Constitution. In his opinion, Judge Frederick J. R. Heebe wrote that this argument was "clearly without merit" in that "courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts like the Vieux Carré"[17] were involved. He added that such an ordinance is "confiscatory and thus unconstitutional only when it 'goes so far as to preclude the use of the property for any purpose for which it is reasonably adapted.' "[18]

In 1975, the United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision.[19] The court noted that the Vieux Carré Commission Ordinance specifies the Commission's composition. Six of the Commission's members are required to have certain interests or qualifications. In the court's opinion, the possibility of abuse by the Commission was lessened by these requirements.[20] During the following year, the United States Supreme Court denied the petition for a writ of certiorari.[21] This was the first historic district case to reach the nation's highest court.

2. ADVERTISING SIGNS

In the second case to reach the Louisiana Supreme Court in 1941,[22] a French Quarter property owner was prosecuted by the city for displaying an advertising sign that exceeded the specifications set forth in the Vieux Carré Commission Ordinance. The prosecution was dismissed by the lower court, and the city appealed.

The city's position was upheld in an opinion written by Chief Justice Charles A. O'Niell. The purpose of the historic district ordinance, he wrote, was to preserve the antiquity of the French and Spanish Quarter "by defending this relic against iconoclasm or vandalism."[23] Such preservation can only be accomplished by "preventing or prohibiting eyesores in such a locality. . . ."[24] The commercial value of the French Quarter as a tourist attraction was also cited as a reason for upholding the Vieux Carré Commission

17. *Id.*
18. *Id.* at 662.
19. Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975).
20. *Id.* at 1062.
21. Maher v. City of New Orleans, 426 U.S. 905 (1976).
22. City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).
23. *Id.* at 858, 5 So. 2d at 131.
24. *Id.*

Ordinance. A similar result was reached in 1953 in the first case of *City of New Orleans v. Levy.*[25]

3. BOUNDARIES

In 1964 an ordinance enacted by the City Council exempted certain areas of the French Quarter from the Vieux Carré regulatory law. The court ruled that the exemption was invalid in the case of the *Vieux Carré Property Owners and Associates v. City of New Orleans.*[26]

D. *The Dukes Case*

The City Council in 1972 passed an ordinance prohibiting the sale of food from pushcarts in the French Quarter. Vendors who had been operating in the Quarter for eight years were excepted from the ordinance. Nancy Dukes, who had been doing business as Louisiana Concessions for two years in the Quarter, brought an action challenging the ordinance. She alleged that it denied her equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The United States district court granted the city's motion for summary judgment. On appeal, the case was reversed and remanded. The city then appealed to the United States Supreme Court.

In its opinion, the Court stated that unless an economic regulation's "classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and required only that the classification challenged be rationally related to a legitimate state interest."[27] The Court added that the Council's objective to preserve the Quarter's appearance and custom was obviously legitimate. It declared that:

> the City Council plainly could further that objective by making the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of an historic area and disturb tourists and their enjoyment of that charm and beauty, and that such vendors in the Vieux Carré, the heart of the city's tourist industry, might have a deleterious effect on the economy of the city. They therefore determined that to ensure the economic vitality of that area, such businesses should be substantially curtailed in the Vieux Carré, if not totally banned.[28]

25. 223 La. 11, 64 So. 2d 798 (1953). For a related case, *see* City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).
26. 246 La. 788, 167 So. 2d 367 (1964).
27. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).
28. *Id.* at 304.

The gradual approach to eliminating street vendors was deemed to be constitutionally permissible.[29] The ordinance was, therefore, upheld by the court.

E. *Individual Historic Landmarks*

In accordance with article VI of the Louisiana Constitution of 1974, the Louisiana Legislature in the following year enacted a statute for the preservation of other historic districts and individual historic landmarks within the state.[30] The constitutionality of individual historic landmarks was upheld in 1978 by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.[31]

F. *The French Quarter Riverfront Expressway Controversy*

The National Historic Preservation Act of 1966[32] provided for the Secretary of the Interior to keep a register of national historic places. The first edition of the *National Register of Historic Places* was published in 1969. In the first *Register,* twelve sites in Louisiana were listed, and the Vieux Carré was designated as a national historic district.[33]

Listing a site or district in the *Register* entitles the place to special legal protection. The National Historic Preservation Act established the Advisory Council on Historic Preservation.[34] Before federal funds may be granted or a federal license issued for a project which will affect a district or site listed in the *Register*, the Advisory Council must be afforded "a reasonable opportunity to comment with regard to such undertaking."[35] The Advisory Council's adverse comment on the proposed French Quarter Riverfront Expressway is now history. The administrative decision by John A. Volpe, Secretary of Transportation, in 1969 not to grant federal funds for the Riverfront Expressway project followed the Advisory Council's recommendation.[36] Thus, the Rivergate Tunnel,

29. *Id.* at 305.
30. LA. REV. STAT. ANN. § 25:731–:767 (West 1975 & Supp. 1981).
31. 438 U.S. 104 (1978).
32. 16 U.S.C. § 470a (1976).
33. NATIONAL PARK SERVICE, THE NATIONAL REGISTER OF HISTORIC PLACES 103–06 (1969).
34. 16 U.S.C. § 470i–m (1976).
35. *Id.* § 470f (1976).
36. *See* Aurbach, *Environmental Policy and Urban Transportation*, 4 URB. LAW. 713, 723 (1972); Farrer, *Impact of Environmental Legislation on the Transportation Decision-Making Process in New Orleans: The Derailment of the I–310*

which cost $1.3 million and was intended to connect to the French Quarter Riverfront Expressway, is still not being used.[37]

G. *Downtown Development District*

In 1974–75, the New Orleans' city administration and Chamber of Commerce formulated a growth management program for its central business district. The Downtown Development District, a local governmental special tax district, succeeded the growth management program in planning for the city's central commercial area.[38] The district's commission was given broad statutory planning powers. In 1975, the district's commissioners adopted a plan for improvements in the district for 1976 and 1977. The plan included funds for a historic preservation program. The City Council next passed ordinances[39] adopting the plan and levying a special ad valorem tax upon all taxable real property in the district in order to provide funds for executing the plan. The electorate approved the special taxes during December, 1975.

Additional special taxes for the district were also approved by the city's voters in 1977 and 1979. Through these taxes, funds were provided for the district's historic building renovation program. Three historic districts were established by the City Council in New Orleans' central business district in 1978.[40]

H. *Conclusion*

The historic preservation movement in Louisiana has made considerable progress. Certainly no one of sound mind would today suggest that the Cabildo be demolished. The planning goal of historic preservation law in cities is to preserve a historic urban design or environment. The construction of high rise buildings in a historic area irrevocably destroys the historic urban design. Thus, the Vieux Carré Amendment to the Louisiana Constitution has been successful in that it has kept the French Quarter free of high rise buildings.

Riverfront Expressway, 51 J. of URB. L. 687 (1974); BAUMBACH & BORAH, THE SECOND BATTLE OF NEW ORLEANS (A HISTORY OF THE VIEUX CARRE RIVERFRONT-EXPRESSWAY CONTROVERSY) (1981).

37. The Times-Picayune, July 3, 1969, at 1, col. 4.

38. *See* LA. REV. STAT. ANN. § 33:2740.3 (West Supp. 1981). For a related statute, *see* the Shreveport Downtown Development District Act, 1975 LA. ACTS 573.

39. New Orleans, La., Ordinance 5,794 (Nov. 5, 1975); New Orleans, La., Ordinance 5,843 (Dec. 5, 1975).

40. New Orleans, La., Ordinances 6,699–6,702 (Mar. 23, 1978).

As the cases illustrate, the enforcement of the Vieux Carré Commission Ordinance changed from a criminal law approach in the 1940s to a civil law approach. Criminal sanctions such as fines were replaced by the Vieux Carré Commission's granting permission for building or demolition permits. Historic preservation matters are essentially civil in nature. Criminal law enforcement should be confined to prosecutions for criminal acts against persons and property.

In rendering decisions in favor of preserving the state's first legally designated historic district, the French Quarter, the Louisiana Supreme Court has been a leader among the nation's courts in developing land planning law for historic preservation. The United States Supreme Court's refusal to grant a writ of certiorari in the *Maher* case confirmed the Louisiana court's leadership.

II. The Miami Beach Architectural "Art Deco" District: A Tale of Two Cities

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It was the best of the *Times*, it was the worst of the *Times*. It was a tale in the *New York Times* of two "cities"—old and new—within one city, Miami Beach.

The two "cities" are adjacent areas within the city limits of Miami Beach. One city is the Architectural, or Art Deco, District, designated an architectural district by the National Historic Trust. It contains art deco and other architecturally significant structures and streetscapes. Preservationists hope to rejuvenate existing structures to create a historical district of value for residents and tourists. The other city has been designated a redevelopment project subject to governmental controls, including eminent domain, a building moratorium and expenditure of public funds to promote substantial, private and commercial development.

The best of *The Times* was an article by Jo Thomas.[1] It described the attempts of the Miami Design Preservation League to protect the Architectural, or Art Deco, District of more than 800 buildings in an area of approximately 125 blocks in Miami Beach.

In her lead, Jo Thomas described the district as follows:

> The buildings, decked with spires and spirals, wrapped with rounded corners and adorned with terrazzo sunbursts and glass flamingos, hint at youth and endless summer, but then they have always traded on illusions.
>
> In the 1930s when most of the Art Deco hotels and apartment buildings in what is now the Miami Beach Architectural District were built, they offered fashionable places to escape the winter and overlook the Depression. Here was a building looking like a steamship, there one like a vacuum cleaner. The guests were enchanted. Many of them decided to stay.[2]

She then noted that the struggle to preserve this district was not dissimilar to that usually confronting older cities. She recognized

1. Thomas, *Miami Beach Conflict Pits Developers Against Lovers of Art Deco,* N.Y. Times, Feb. 26, 1981, at A14, col. 3.
2. *Id.* at A14, col. 1.

"[t]he struggle between the owner's right to destroy and rebuild in the name of profit and property rights, and the community's right to save in the name of history and what some see as beauty."[3]

The worst of the *Times* was an article by William Safire.[4] Mr. Safire referred in his lead paragraphs to John Locke and Thomas Jefferson. He described the dispute over the architectural district as one involving improper actions by a "band of preservationists" who placed the district on the National Register of Historic Places in Washington in a manner which, according to Safire, meant that "the public has a new vested interest in the buildings."[5]

Safire, after invoking Locke and Jefferson, attacked the prior article by Jo Thomas stating that "protecting a person's right to his property . . . is not the same as vesting everybody else with rights to the same property and spreading the happiness around."[6] Safire went on to state that "[a] good example of the way some people with the most highminded and generous of intentions have twisted that principle of protecting property can be seen in a seedy, run-down section of Miami Beach."[7] He described the *Times* article by Jo Thomas as containing a "classic lead that should be studied at journalism schools"[8] and then went on to state "[s]he was writing of the little hotels, built during the Depression, occupied now mostly by elderly residents. The owners would ordinarily tear down and replace these old hotels with modern condominiums. These would generate a higher profit for the owners and a new source of tax revenue for the city."[9]

Safire contended that if you want to save a "favorite old building from the wrecker's ball," you should "start a fund to buy it for public use, or persuade the owners of public relations benefits in preservation."[10] He indicated, however, that you should "not get the Feds to designate the whole neighborhood untouchable, and lobby a city planning board to take from wealthy Peter to pay elitist Paul."[11]

3. *Id.* at A14, col. 2.
4. Safire, *Essay: What Government Is For*, N.Y. Times, Mar. 2, 1981, at A19, col. 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at col. 2.
11. *Id.*

The best of the *Times* and the worst of the *Times* tell a tale of two cities. Safire's article was confirmed to be the worst of *Times* in terms of not only its misreading of Locke but, also, its misunderstanding of the effect of placing the district on the National Register of Historic Places. Separate letters to the editor of the *Times* on Wednesday, March 11, 1981 under the heading of "What Have the Feds and John Locke to Do With Miami's Art Deco?" refuted Safire's contentions.[12]

The President of Bennington College, Joseph S. Murphy, noted that Safire "enlists John Locke, 17th century British empiricist, as a source of his own theory of government as the protector of life, liberty and property. Locke, more often quoted than read, has a view of property which, when properly understood, does not support Safire's use of him."[13] President Murphy went on to note that while Safire had the right to dislike art deco, his reference to Locke did not support the concept of private property for which Safire argued. President Murphy noted:

> Property becomes private, according to Locke, only when "mixed" with the labor of individual persons. A man may not "engross as much as he will"; he may only take what he can use "before it spoils." If he takes more than this, it is "more than his share and belongs to others" ("Second Treatise").[14]

The second letter, sent by Oscar S. Gray, Professor of Law and author of an outstanding text on environmental law, pointed out that Safire's article was "uncharacteristically imprecise in suggesting that 'the Feds' are responsible 'in Washington' for any threat to the property rights of Miami Beach hotel owners."[15] As Professor Gray correctly noted, the fact that the hotels or structures in the district may have been placed on the National Register of Historic Places "has no effect under Federal law on the owner's rights to do anything they wish with their property, including demolition."[16] Professor Gray and President Murphy sided with Safire's architectural taste. Professor Gray, however, noted in conclusion that: "It is far better to risk a slight surplus of Art Deco here and there (especially in Miami Beach) than to stir up boobery throughout the land, even in defense of legitimate property claims."[17]

12. N.Y. Times, Mar. 11, 1981 at A26, cols. 4, 5, 6.
13. *Id.* at col. 6.
14. *Id.*
15. *Id.* at col. 4.
16. *Id.*
17. *Id.* at col. 5.

The ultimate refutation of Safire's claims that the Feds had designated a whole neighborhood untouchable, was most graphically displayed on Thursday, April 24, 1981. The owners of the New Yorker, a landmark art deco hotel in the district, determined that they would destroy it and proceeded with its demolition.[18]

The real tale of two cities, however, is demonstrated by the position that Miami Beach has taken regarding two "projects" in an adjacent area. It is in this respect that the best of the *Times* and the worst of the *Times* articles demonstrate the tale of two cities. Although William Safire's article was datelined Miami and although he improperly attacked a preservation effort which did not affect property rights, he said nothing about what the Supreme Court of Florida referred to as "cataclysmic demolition" of a large area of Miami Beach adjacent to the architectural district. The "cataclysmic demolition" was promoted by private interests through government action to enable privately built and operated tourist resorts.

In *State v. Miami Beach Redevelopment Agency*,[19] the Florida Supreme Court validated bonds to enable the City of Miami Beach Redevelopment Agency to finance a project. According to the court, Miami Beach declared the south end of the city a blighted area within the meaning of the Community Redevelopment Act so that it could create a redevelopment agency.[20] The South Beach area of the city involved approximately 235 acres and 420 structures, of which 205 were found to be defective, substandard or obsolete. Most of the buildings within the area were determined to be over forty years old. The court determined that the purpose of the redevelopment project, which involved expenditure of public funds, sale of public bonds and the use of eminent domain for acquisition and clearance, would allow "substantial private and commercial uses after redevelopment."[21] The court found this to be a constitutional purpose. The court noted that the area involved had approximately 7,000 residents, most of them elderly and of low income. Some of the residents owned homes or condominiums within the area. The court also noted that the Redevelopment Agency planned to uproot approximately 4,200 households and 450 businesses, although it would construct a low-income housing

18. Miami Herald, Apr. 24, 1981 at B1, col. 2.
19. 392 So. 2d 875 (Fla. 1980).
20. *Id.* at 882.
21. *Id.* at 891.

project containing 450 units. As a result, the court concluded that "most displaced families and individuals . . . will have to be relocated out of the area."[22]

The supreme court was not dealing with the wisdom of the project but, rather, the municipal bond provisions and the relevant statutes. The court specifically noted that "[t]he wisdom of authorizing the cataclysmic demolition and redesign of neighborhoods or even whole districts is not for the Court to determine."[23] The purpose of the redevelopment was, as the court found, to enable private interests to work for a redevelopment agency in order to create a tourist resort in the area. The redevelopment concept in this area of the city created a self-fulfilling prophecy. In order to obtain the bonds, a blight had to be declared. As a result of the moratorium on building, a blighted area now exists.

It is ironic that the choice—between establishing a moratorium (ultimately to create a blighted area) so that bonds could encourage new development, or establishing a historic designation to protect an adjacent area—has been approached so differently, not only by Safire, but also by Miami Beach's elected officials. Safire's article, by suggesting knowlege of Miami Beach in attacking the architectural district (although remaining silent as to the redevelopment district to the south), portrayed the concept of historic preservation as at odds with property rights. Miami Beach officials, by their disregard for protection of the district and grant of demolition permits as a ministerial act not even to be reviewed, also spoke effectively through their silence. As a result, historic landmarks which might have been preserved were reduced to rubble.

Thus, the tale of two cities involves the difference in public perception of (1) government action allowing demolition of private residences and buildings, a moratorium and public financing in an area to enable new construction promoting tourism and commercial activities; and (2) government action to encourage preservation of an already constructed area which could be redesigned to serve as an international tourist attraction and still preserve a unique lifestyle. The goals sought by each governmental action for Miami Beach are similar.

The lesson from the tale of the two "cities," however, goes beyond a comparison of the South Beach Redevelopment Agency

22. *Id.* at 892.
23. *Id.* at 891.

project and the Architectural, or Art Deco, District within Miami Beach. The lesson can be found in value systems involved.

If Safire's arguments were valid, they could equally have been applied to the governmental action resulting in the South Beach Redevelopment Agency project. If Miami Beach did not want to engage in governmental controls, it could have used the same arguments it used to allow the demolition of the art deco structures in the National Register of Historic Places in order to justify rejecting the redevelopment of an area by use of what the supreme court referred to as "cataclysmic demolition" in the South Beach community.

Nor can one say that in the long run the South Beach Redevelopment Agency's actions will create more tourism or more jobs than the type of activities that could be encouraged in the architectural district. Without even obtaining the real support of Miami Beach's elected officials, the Architectural, or Art Deco, District has received international fame. Tourists and those interested in architecture come from all over to see the world's largest art deco district.[24] Furthermore, historic preservation has substantive economic benefits. Although it has been demonstrated that historic preservation is an area which the federal government has not substantially subsidized, it has become an attractive area for private investment. Rehabilitation projects are as high as 74 percent labor intensive as compared to 50 percent for new construction projects.[25]

The key to historic preservation is education to avoid at the state and local level tales similar to those which describe the two "cities" within Miami Beach. With the exception of a few limited areas in which federal involvement creates a statutory basis for review or the use of a federal permit justifies an environmental impact statement, most efforts at historic preservation are resolved at the state and local level.[26] As noted by one commentator, most cases in which local governments "at the last minute" decide they want to

24. Bartlett, *Miami Beach Bets on Art Deco*, Jan./Feb. 1981 HISTORIC PRESERVATION 8.

25. OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION, U.S. DEP'T OF THE INTERIOR, CONSERVATION OF THE URBAN ENVIRONMENT (1977).

26. *Cf.* Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980) (five incorporated neighborhood organizations found to have standing to challenge demolition of historically and architecturally significant buildings within an urban renewal project partially funded by federal grant).

save a landmark from demolition create legal problems.[27] *Texas Antiquities Committee v. Dallas Community College*[28] is cited as a sober warning. In that case, the Texas Supreme Court "heavily influenced by what it perceived as a less than good faith effort by preservationists in rushing through an application for National Register status without giving notice to the owner, permitted buildings of landmark quality to be demolished."[29]

In Miami Beach, efforts to obtain protection of historic structures in the architectural district have been attributed by some to be the cause of the demolition rush that occurred in connection with the New Yorker Hotel. Certain Miami Beach property owners opposed to the architectural district were content to engage in debate as long as efforts by preservationists were directed towards Miami Beach's elected officials. Demolition activities increased, however, when the county passed an ordinance providing local governments such as Miami Beach with the option of passing local preservation ordinances or of coming under a county historic preservation ordinance if they did not enact their own ordinance within a fixed period of time. Such demolition rushes have been described as common occurrences:

> Another common fact situation involves applications to demolish landmarks by owners or developers who contemplate enactment of protective legislation by a local government. A landmarks commission may be in the process of surveying and studying an area with an eye towards creation of a historic district. When developers get wind of such a possibility, they flock to city hall to get demolition or building permits in hopes of establishing a vested right to tear down potential landmarks that might stand in the way of their development plans.[30]

Historic preservation does not result from designation in the National Register of Historic Places. It requires education. There must be a greater effort to explain to the public the economic incentives for historic preservation. The public must have a greater understanding not only of historic and aesthetic values but also of economic profits accruing from historic preservation. Once this is done, there is better reason to believe that laws will be passed to support historic preservation efforts.

Judicial attitudes favor the right of local governments to exercise the police power, the basic mechanism that must be used in connection with historic preservation since, like any other zoning

27. Duerkson, *In the Eleventh Hour: Rescuing Landmarks at the Last Minute*, in HISTORIC PRESERVATION LAW 833 (Robinson 1980).
28. 554 S.W.2d 924 (Tex. 1977).
29. Duerkson, *supra* note 27, at 835.
30. *Id.* at 838–39.

concept, it relies on architectural controls relating to governmental decisions. Ironically, there might be some who would disagree with this by contending that the philosophy of the Supreme Court today relates back to the same time period when the Architectural, or Art Deco, District in Miami Beach was first being constructed in the 1920s and 1930s. They might also argue that such a philosophy is basically conservative and has resulted in invalidation of social legislation regulating private property.

Nevertheless, as the Supreme Court of the United States noted in *Penn Central Transportation Co. v. City of New York*,[31] a landmarks preservation law does not constitute a "taking" of private property by the government without just compensation violative of Fifth and Fourteenth Amendments. As long as such a regulatory law does not interfere with the present uses of the building and allows the building's owners to continue the use and obtain a reasonable return on their investment, it is valid. Nor has there been a more conservative turn since *Penn Central* which could affect subsequent Supreme Court decisions. It appears that even a more conservative judicial philosophy will not result in invalidation of local ordinances intended to protect a lifestyle that could be regarded as part of the historic or aesthetic rights of local residents.

The introductory paragraphs of the *Penn Central* decision recognized two concerns which have precipitated historic preservation laws:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life of all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."[32]

Under the rubric of quality of life, the Supreme Court has articulated a willingness to uphold local ordinances, even where they are challenged as contrary to federal laws and constitutional rights.

In *City of Memphis v. N.T. Greene*,[33] the Supreme Court upheld a street closing claimed to have denied black citizens from an

31. 438 U.S. 104 (1978).
32. *Id.* at 108.
33. ___ U.S. ___, 101 S. Ct. 1584 (1981).

adjacent neighborhood the right to travel through a white neighborhood. The complaint alleged that the closing constituted a violation of 42 U.S.C. § 1982 and the prohibition in the Thirteenth Amendment against establishing a "badge or incident of slavery." The Supreme Court allowed the placement of the barrier, notwithstanding what the dissent claimed to be the establishment of "racial enclaves." The Court justified its decision, relying on the same concept of protection under the police power clause as has been used to justify historic preservation ordinances. Thus, the following language from *City of Memphis* suggest that a more conservative Court will not necessarily lead to the destruction of the concepts underlying historic preservation:

> The residential interest in comparative tranquility is also unquestionably legitimate. That interest provides support for zoning regulations, designed to protect a "quiet place where yards are wide, people few, and motor vehicles restricted . . ." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9; *County Board of Arlington County v. Richards*, 434 U.S. 5, and for the accepted view that a man's house is his castle. The interest in privacy has the same dignity in a densely populated apartment complex, *cf. Payton v. New York*, __ U.S. __, or in an affluent neighborhood of single family homes. In either context, the protection of the individual interest may involve the imposition of some burdens on the general public.
>
> Whether the individual privacy interests of the residents of Hein Park, coupled with the interests in safety, should be considered strong enough to overcome the more general interest in the use of West Drive as a thoroughfare is the type of question that a multitude of local governments must resolve every day. Because there is no basis for concluding that the interests favored by the city in its decision were contrived or pretextual, the District Court correctly concluded that it had no authority to review the wisdom of the city's policy decision. *See Railway Express v. New York*, 336 U.S. 106, 109.[34]

The foregoing language suggests that once a local government determines, as a matter of policy, that it intends to save an area, the exercise of values by such elected representatives will not be invalidated by the courts. This, of course, does not suggest that the judiciary is necessarily approving the effects. A decision to allow the protection of landmark structures by passage of a local ordinance will be deemed equally as valid as a decision not to act and thereby allow the demolition of such historic structures.

In the final analysis, the tale of two "cities" within Miami Beach suggests that education as to the issues involved may be necessary. If elected politicians do not understand the tale's lesson, then the voters will have to be educated in order to clarify its meaning. In this regard, it is also clear that "a far, far better" tale of the *Times*

34. *Id.* at ___, 101 S. Ct. at 1600.

appeared in the article which factually set forth the controversy involving the Architectural, or Art Deco, District within Miami Beach, than in the *Times* article which improperly relied on alleged doctrines of Locke and suggested that historic designation on the federal level automatically deprives owners of their property.